No. 10-589

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

STATE OF IDAHO-Petitioner,

vs. **CAPITAL CASE**

DALE CARTER SHACKELFORD-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF IDAHO

LEO N. GRIFFARD*
Attorney at Law
P.O. Box 2006
Boise, Idaho 83701
Telephone: (208) 331-0610

ATTORNEY FOR RESPONDENT DALE CARTER SHACKELFORD

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. THE QUESTIONS PRESENTED ARE PREMISED ON PETITIONER'S MISSTATEMENT OF THE HOLDING OF THE IDAHO SUPREME COURT 3

A. The Idaho Supreme Court applied a *de facto* harmless error analysis of the *Ring* error in this case. 4

B. The Idaho Supreme Court did not treat the *Ring* error as structural 5

II. THE DECISION OF THE IDAHO SUPREME COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND 5

III. HOW THE IDAHO SUPREME COURT CHOOSES TO DEFINE AND APPLY A STATE LAW AGGRAVATING CIRCUMSTANCE TO THE PARTICULAR FACTS OF THIS CASE DOES NOT PRESENT AN IMPORTANT CONSTITUTIONAL QUESTION WORTHY OF THIS COURT'S REVIEW 6

IV. THIS CASE WILL HAVE LITTLE OR NO IMPACT ON FUTURE OR PENDING CASES 7

CONCLUSION 8

ADDENDUM CONTAINING EXCERPTS OF PETITIONER'S APPENDIX CITED HEREIN

TABLE OF AUTHORITIES

FEDERAL CASES

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ..... *passim*

Schriro v. Summerlin, 542 U.S. 348 (2004) 7

United States v. Johnston, 268 U.S. 220 (1925) 6

IDAHO CASES

McKinney v. State (In re Rhoades), 2010 Ida. App. LEXIS 103, Idaho Supreme Court, June 4, 2010 7

State v. Lovelace (Lovelace II), 140 Idaho 73, 79, 90 P.3d 298, 304 (2004) 3

IDAHO STATUTES

Idaho Code §19-2515(h)(2)(2000). ..... *passim*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Idaho, seeks this Court's review of the unanimous decision of the Idaho Supreme Court vacating Dale Carter Shackelford's death sentence and ordering that Shackelford be resentenced by a jury pursuant to the dictates of *Ring v. Arizona*, 536 U.S. 584 (2002). This petition should be denied because, among other reasons, Petitioner materially misstates the holding of the Idaho Supreme Court.

STATEMENT OF THE CASE

Shackelford was convicted by the jury of the first degree murders of Donna Fontaine and Fred Pahlaniuk. According to the indictment and the jury instructions, the murders were committed in Latah County, Idaho, "on or about the 29th day of May, 1999." (App. 76) [1] Donna and Fred were last seen alive on the morning of May 29, 1999, and their bodies were discovered in a building which had been destroyed by a fire which was discovered that evening. (App. 3-4). There were no eyewitnesses to the crime. There was no testimony placing Shackelford at the scene of the crime, nor were the times of the deaths definitively established. Because the case was tried before this Court's decision in *Ring*, the trial judge, without any input from the jury, determined that Idaho's multiple murder aggravating circumstance applied, weighed the aggravating circumstances against the mitigating circumstances, and sentenced Shackelford to death.

The trial judge reasoned that because the murders were committed on the same date and at the same location, the murders were committed "at the same time" pursuant to Idaho's

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[1]For ease of reference, Respondent has attached to this Brief as an addendum the cited pages from the Appendix.

multiple murder aggravating circumstance, I.C. § 19-2515(h)(2) (2000). However, the jury was not asked whether, nor did it expressly find that, the murders were committed "at the same time", nor was the jury provided with a definition of the term "at the same time". Although there was evidence from which the jury could have found that the murders were committed on the same day and in the same vicinity, the Idaho Supreme Court later stated that it could not " find beyond a reasonable doubt that a reasonable jury could find that the state proved that Donna and Fred were killed at the same time." (App. 80).

Idaho's unitary system of capital case review required that Shackelford's direct appeal was stayed pending the completion of post conviction proceedings in the district court. Therefore, because Shackelford's direct appeal was not yet final when this court announced the *Ring* decision, it is undisputed that *Ring* applies to this case and that *Ring* error occurred in the penalty phase of Shackelford's trial. Thus it was the district court which first addressed Shackelford's *Ring* claim during the post-conviction proceedings. The district court reasoned that Shackelford's death sentence should be set aside because, in its view, *Ring* required a jury, not a judge, to weigh the mitigating factors against the aggravating factors. (App. 75) The district court did not agree with Shackelford's contention that the jury did not find any aggravating factors. Instead, the district court found that the jury's verdicts for first degree murder of both Fred and Donna established the existence of the multiple murder aggravator pursuant to I.C. §19-2515(h)(2). (App. 75) The district court found that because the "jury found [Shackelford] guilty of the first degree murders of both Donna Fontaine and Fred Palaniuk at the same location and on the same date" the verdicts established the existence of multiple murders "which constitutes a statutory aggravator beyond a reasonable doubt." (App. 75-76)

The State appealed the district court's ruling that Shackelford's death sentence be set aside and that he be resentenced by a jury. The Idaho Supreme Court affirmed the district court's decision that Shackelford must be resentenced, but did so on a different ground. The Idaho Supreme Court specifically held as follows:

> Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time.* Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

(App. 80). (emphasis supplied).

In reaching this conclusion, the court stated that it must "first resolve *whether the error is harmless beyond a reasonable doubt* where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." (App. 77)(emphasis supplied). The court followed its decision in an earlier Idaho *pre-Ring* judge sentencing case, *State v. Lovelace (Lovelace II)*, 140 Idaho 73, 79, 90 P.3rd 298, 304 (2004) in which the court had applied a *de facto* harmless error analysis to a *Ring* claim.

REASONS FOR DENYING THE PETITION

1. THE QUESTIONS PRESENTED ARE PREMISED ON PETITIONER'S MISSTATEMENT OF THE HOLDING OF THE IDAHO SUPREME COURT.

Question Presented Number 1 states in pertinent part:

> Because statutory aggravating factors are the functional equivalent of a greater offense and the failure to instruct the jury regarding the multiple murder aggravator did not vitiate all of the jury's findings, did the Idaho Supreme Court

err by concluding *Ring* error is not subject to harmless error analysis?

Petition at i-ii. The Idaho Supreme Court did not conclude that "*Ring* error is not subject to harmless error analysis". To the contrary, in holding that the *Ring* error in Shackelford's case required resentencing by a jury, the Idaho Supreme Court did apply a *de facto* harmless error analysis to the error. Nor did the Idaho Supreme Court treat the *Ring* error as structural.

A. The Idaho Supreme Court applied a *de facto* harmless error analysis of the *Ring* error in this case.

The holding of the Idaho Supreme Court is as follows:

> Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time.* Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

(App. 80). (emphasis supplied). In reaching this conclusion, the Idaho Supreme Court did indeed conduct harmless error review. The court stated that it must "first resolve *whether the error is harmless beyond a reasonable doubt* where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." (App. 77)(emphasis supplied). The court followed its decision in an earlier Idaho *pre-Ring* judge sentencing case, *State v. Lovelace (Lovelace II)*, 140 Idaho 73, 79, 90 P.3rd 298, 304 (2004) in which the court had applied a *de facto* harmless error analysis to a *Ring* claim.

The Idaho Supreme Court conducted a *de facto* harmless error review and found that the

evidence presented at Shackelford's trial did not establish beyond a reasonable doubt that the murders were committed at the same time. However the Petitioner chooses to label the analysis used by the Idaho Supreme Court, the court examined the evidence and made a factual determination that the state's proof at trial did not establish beyond a reasonable doubt that the murders were committed at the same time. Petitioner is simply unhappy with the result of the Idaho Supreme Court's analysis and fact-finding and wants this Court to reexamine the facts of the case. Petitioner also seeks to have this court provide a different definition of the Idaho multiple murder aggravating circumstance than that employed by the state of Idaho's highest court.

B. The Idaho Supreme Court did not treat the *Ring* error as structural.

Petitioner begins the argument section of the Petition with the assertion that "[t]he Idaho Supreme Court's conclusion that *Ring* error is 'structural' and cannot be reviewed for harmless error is an important federal constitutional question and one upon which there is now a conflict and significant controversy." (Pet. at 8). However, Petitioner is unable to cite to exactly where in the opinion of the Idaho Supreme Court is found "the conclusion that *Ring* error is structural". This is because the Idaho Supreme Court did no such thing. No fair reading of the decision of the Idaho Supreme Court reveals that the Court was treating *Ring* error in this case as structural.

There is no conflict and significant controversy caused by the Idaho Supreme Court's decision in this case because the Idaho Supreme Court did not treat the *Ring* error as structural.

II. THE DECISION OF THE IDAHO SUPREME COURT RESTS UPON AN INDEPENDENT AND ADEQUATE STATE GROUND

Petitioner does not argue that the Idaho Supreme Court misstated this Court's holding in

Ring. The decision of the Idaho Supreme Court rests in substantial part on that court's rejection of the district court's finding that because the murders were committed on the same date and at the same location, the murders necessarily were committed "at the same time" pursuant to the Idaho multiple murder aggravating circumstance. (App. 75-76, 79-80). I.C. §19-2515(h)(2). The Idaho Supreme Court's definition of and application of the phrase "at the same time" to the facts of this case is an independent and adequate state ground for the decision below. Accordingly, this court lacks jurisdiction to review the decision of the Idaho Supreme Court.

III. HOW THE IDAHO SUPREME COURT CHOOSES TO DEFINE AND APPLY A STATE LAW AGGRAVATING CIRCUMSTANCE TO THE PARTICULAR FACTS OF THIS CASE DOES NOT PRESENT AN IMPORTANT CONSTITUTIONAL QUESTION WORTHY OF THIS COURT'S REVIEW

It is for the Idaho Supreme Court to define the phrase "at the same time" contained in Idaho's multiple murder aggravator and to apply its definition to the particular facts of this case. The Idaho Supreme Court found as a factual matter that the evidence presented at trial did not prove beyond a reasonable doubt that the murders were committed "at the same time". (App. 80). This Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioner is asking this court to reexamine the facts of this case and to second guess the Idaho Supreme Court's determination that the evidence at trial did not establish beyond a reasonable doubt that the murders were committed at the same time. The principles of comity and federalism require that the Idaho Supreme Court be the final arbiter of the application of state law to the facts of a given case.

IV. THIS CASE WILL HAVE LITTLE OR NO IMPACT ON FUTURE OR PENDING CASES.

Petitioner's claim that the decision of the Idaho Supreme Court will create continuing analytical difficulty in addressing future capital cases is wrong for several reasons. First, Petitioner's argument is based on the incorrect assertion, as demonstrated above, that the Idaho Supreme Court mistakenly believed that it could not apply harmless error analysis to *Ring* error when the court did apply a *de facto* harmless error analysis in this case. Second, Petitioner cites to no specific examples of pending cases in any jurisdiction where a court is confronted with *Ring* error on direct review. This is because all of the former judge-sentencing states have adopted capital case jury determination of death eligibility in response to *Ring*. It is difficult to imagine how a *Ring* error as occurred in this case could reoccur.

There are no Idaho capital cases which are pending on direct review which involve *Ring* error. Furthermore, Idaho has refused to apply state law to afford *Ring* relief to cases on collateral review. *McKinney v. State (In re Rhoades)*, 2010 Ida. LEXIS 103, Idaho Supreme Court, June 4, 2010. Likewise, it is difficult to imagine how the decision of the Idaho Supreme Court will cause any difficulty or confusion in adjudicating federal habeas cases because this court has held that *Ring* will not be retroactively applied to cases already final on direct review. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

CONCLUSION

The decision of the Idaho Supreme Court is fact bound and does not involve constitutional questions of broad importance. The decision of the Idaho Supreme Court correctly applied *Ring* to the unique facts of this case and will have limited, if any, application to other cases. Finally, it is the primary responsibility of the Idaho courts, not this Court, to define and apply an Idaho statute to the particular facts of this case. For all of the foregoing reasons, Respondent respectfully urges that this Court DENY the petition for writ of certiorari.

RESPECTFULLY SUBMITTED THIS 4TH DAY OF FEBRUARY, 2011.

Leo N. Griffard
Counsel of Record for Respondent

IDAHO v. SHACKELFORD

No. 10-589

ADDENDUM TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXCERPTS FROM PETITIONER'S APPENDIX

BURDICK, Justice

Dale Carter Shackelford appeals from his judgment of conviction, based upon jury verdicts finding him guilty of the first-degree murders of Donna Fontaine and Fred Palahniuk, conspiracy to commit first-degree murder, first-degree arson, conspiracy to commit first-degree arson, and preparing false evidence. He also appeals from his sentences of death for first-degree murder, as well as the partial denial of his claims for post-conviction relief. The State cross-appeals, challenging the district court's grant of post-conviction relief, which set aside Shackelford's death sentences and requires resentencing. We find that any error committed by the district court was harmless, and we therefore affirm on all issues. We affirm the district court's order for resentencing on different grounds.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The State alleged that Shackelford conspired with Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz.[1] Millar and Lasater worked for

[1] The charges against John Abitz were eventually dismissed.

Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.

Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at

2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

Shackelford was indicted on February 11, 2000, and charged with two counts of first-degree murder, first-degree arson, conspiracy to commit first-degree murder, conspiracy to commit arson, and preparing

false evidence. Trial began on October 16, 2000, and concluded December 22, 2000. The jury returned guilty verdicts on all counts charged in the Indictment. Sentencing commenced on August 27, 2001, and, on October 25, 2001, the district court read its Findings of the Court in Considering Death Penalty. As to Donna's murder, the court found that the State had proven beyond a reasonable doubt two statutory aggravating factors: I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000).[2] As to Fred's murder, the court found the statutory aggravating factor under I.C. § 19-2515(h)(2) (2000). After weighing the mitigating factors against the individual statutory aggravating factors, the court concluded that the mitigating factors were not sufficiently compelling to render the death penalty unjust, and sentenced Shackelford to death for both first-degree murders. Shackelford was also given prison sentences for the other felony offenses. The judgment of conviction was filed November 1, 2001. Shackelford appeals from his convictions.

On April 8, 2005, the district court addressed the parties' motions for summary disposition regarding Shackelford's petitions for post-conviction relief. The court granted Shackelford sentencing relief, concluding that *Ring v. Arizona*, 536 U.S. 584 (2002), mandated that the jury conduct the weighing of

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[2] The statutes are currently codified at I.C. §§ 19-2515(9)(b) and (9)(k) and consist of identical language.

> 5. at a grand jury proceeding in Latah County which was authorized by law.
>
> If you find any of the above have not been proven beyond a reasonable doubt, you must find the defendant not guilty of Preparing False Evidence. If each of the above has been proven beyond a reasonable doubt, you must find the defendant is guilty of Preparing False Evidence.

We find that the term "produced" was not ambiguous in the jury instruction. The jury instruction itself answers the question of what the term "produced" meant because it provides that the evidence was produced "at a grand jury proceeding." Thus, Shackelford's argument that "produced" may have meant actually making the tape or giving the tape to someone or bringing it to someone's attention is invalid because the evidence had to be produced as genuine or true at the actual grand jury proceeding. There is nothing ambiguous about the jury instruction when read in its entirety. Therefore, we find that the jury was properly and adequately instructed.

3. Post-Conviction Issues

Shackelford raises a number of post-conviction issues dealing with the effectiveness of his counsel during the guilt phase of his trial, as well as a *Brady* claim. He maintains that the district court erred in summarily dismissing his claims that he was deprived the right to counsel of choice, and that his

counsel was ineffective due to lack of qualifications, in impeaching State's witnesses, and in preparing defense expert witnesses.

a. Standard of Review

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Workman v. State,* 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). The applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Id.* Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Id.* Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. *Id.* "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *State v. Payne,* 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *see also* I.C. § 19-4903.

b. The district court did not err in denying Shackelford's *Brady* claim.

Shackelford asserts that the State failed to disclose material that would have undermined the testimony of Dr. Robert Cihak in the form of peer

review notes provided by Dr. John Howard. The State contends that Shackelford failed to establish that the State was required to disclose Dr. Howard's notes or that the notes would have resulted in a different verdict.

The United States Supreme Court held in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Subsequent to *Brady,* the Supreme Court expanded the duty to include volunteering exculpatory evidence never requested, or requested only in a general way. *United States v. Bagley,* 473 U.S. 667, 682 (1985). However, the prosecution need volunteer evidence only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs,* 427 U.S. 97, 108 (1976). Showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

To prove a *Brady* violation, three components must be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). Thus,

a new trial is not automatically required whenever "'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" *Giglio v. United States,* 405 U.S. 150, 154 (1972). Instead, the Supreme Court has held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles,* 514 U.S at 433 (1995) (quoting *United States v. Bagley,* 473 U.S. 667, 682 (1985)). A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Kyles,* 514 U.S. at 434 (quoting *Bagley,* 473 U.S. at 678).

Dr. Cihak testified regarding his "guesstimate" that, based on his examination of the contents of Fred's stomach, Fred had eaten "probably several hours before he – within several hours of his death." There are many factors that affect digestion, and Dr. Cihak offered that "one can never be exact because one doesn't know at the time of autopsy what was going on necessarily from the time that victim has eaten." He also explained that determining how long contents had been in the stomach was "a very controversial area. And there are people that feel some factors either speed or delay, and other people will take the opposite. This is a very, let us say, not scientifically identified area." Dr. Cihak also testified

that his findings had been "peer review[ed]." In his post-conviction claims, Shackelford contended that the State withheld exculpatory evidence by failing to disclose the peer review notes of Dr. John Howard. However, as the district court found below, Shackelford was provided with the notes of Dr. Howard but was not provided with the abstracts that accompanied the notes, which consisted of several scientific articles questioning the validity of determining a victim's time of death based upon stomach content. As the court pointed out, the abstracts came from medical journals that were generally available and did not contradict Dr. Cihak's testimony that he could offer only a "guesstimate" of the time of death.

On appeal, Shackelford's only statement regarding the notes of Dr. Howard is as follows: "The State failed to disclose material which would have undermined the testimony of Dr. Cihak. This evidence consists of peer review notes provided by Dr. John Howard concerning Dr. Cihak's 'guesstimate' of the time of death based on stomach contents." Shackelford argues nothing about how the abstracts or the notes would have undermined the testimony, nor how he was prejudiced by any failure to disclose the notes. Furthermore, we find that there was no prejudice because Dr. Cihak himself testified that determining time of death based on stomach contents was a "controversial" and "not scientifically identified" area. We find that the district court did not err in denying Shackelford's *Brady* claim because he has not shown the reasonable probability of a different result.

c. Shackelford was not deprived of his right to counsel of choice.

Shackelford argues that because the Latah County Sheriff's Department seized nearly $5,000 in cash from him, he could not afford to hire a lawyer. He contends in his brief on appeal that he solicited at least four private criminal defense lawyers for representation, including James Siebe, and testified that the $5,000 could have covered the expense of hiring an attorney for his initial appearance. Shackelford asserts that the failure to allow him to choose his own counsel violates his qualified right to choice of counsel and constitutes prejudicial error per se.

The State maintains that Shackelford failed to establish that $5,000 would have retained an attorney to represent him in a capital double murder case and therefore this claim fails. The State also argues that Shackelford has not challenged the district court's findings, particularly with regard to his "evasiveness," and that the $5,000 would have been insufficient to do more than retain counsel for the "initial proceedings." In addition, Shackelford presented no evidence that he had assets close to the $500,000 trial counsel were paid to represent Shackelford.

The Sixth Amendment guarantees defendants in criminal cases the right to adequate representation and to a qualified right to choice of counsel, but "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they

process." *State v. Severson,* 147 Idaho 694, ___, 215 P.3d 414, 443 (2009) (quoting *State v. Martinez,* 125 Idaho 445, 453, 872 P.2d 708, 716 (1994)). The presence of errors alone, however, does not require the reversal of a conviction. *State v. Moore,* 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The cumulative effect of the errors we have noted, when viewed in relation to the totality of the evidence presented at trial, did not deprive Shackelford of a fair trial.

B. Sentencing Phase

The State has cross-appealed the district court's grant of post-conviction relief under *Ring v. Arizona,* 536 U.S. 584 (2002), which set aside Shackelford's death sentences for resentencing by a jury. The State argues that, because the weighing of mitigating factors under I.C. § 19-2515(c) does not increase the penalty from life to death, but actually reduces the penalty from death to life, the weighing process is not the functional equivalent of an element of a greater offense and, therefore, the jury was not mandated to complete the weighing process in Shackelford's case. In addition, the State argues that since the jury's first-degree murder verdicts established that Shackelford murdered Donna and Fred at the same location and date, it follows that the jury found the multiple murder aggravator of I.C. § 19-2515(h)(2) (2000) beyond a reasonable doubt.

Shackelford contends that his death sentence is unconstitutional under *Ring* because the jury did not

make the findings of fact that made Shackelford eligible for the sentence of death. He argues that the jury could not have found the aggravating circumstance under I.C. § 19-2515(h)(2) because the jury did not take part in Shackelford's sentencing proceedings and the guilt-phase verdict is not sufficient to conclude that the jury would have found the statutory aggravating circumstances beyond a reasonable doubt. Alternatively, Shackelford argues that even if this Court finds that the district judge could permissibly infer the requisite finding of the statutory aggravator in this case, the district court's vacation of Shackelford's death sentence must be affirmed because the jury did not weigh the aggravator against the mitigating circumstances.

Both Shackelford and the State agree that *Ring v. Arizona* applies because the Supreme Court released the decision in *Ring* during the time the direct review of this case was pending. *See Griffith v. Kentucky,* 479 U.S. 314, 323 (1987). The district court found that Shackelford's death sentence should be set aside because a jury, not a judge, must weigh the mitigating factors against the aggravating factors. The court did not agree with Shackelford's contention, however, that the jury did not find any of the aggravating factors. Instead, the district court found that the jury's verdicts for first-degree murder of both Donna and Fred established the existence of multiple murders and thus found the statutory aggravator beyond a reasonable doubt pursuant to I.C. § 19-2515(h)(2). Specifically, the court stated: "[T]he jury

found the Petitioner guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt."

The jury here found Shackelford guilty of the first-degree murder of both Donna and Fred by general verdict, which respectively read: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." The verdicts for the murders of both Donna and Fred were based on jury instructions that instructed the jury to find beyond a reasonable doubt that "the killing occurred in Latah County, and in the State of Idaho" and that "the killing occurred on or about the 29th day of May, 1999." The district court's finding of aggravating factors in its original imposition of the death sentences was based on both I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000), in the case of Donna, and I.C. § 19-2515(h)(2), in the case of Fred. In its Findings of the Court in Considering Death Penalty, the district court found, as to Donna's murder, that the State had proven beyond a reasonable doubt two statutory aggravating factors, including: (1) at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2), and (2) the murder was committed against a witness or potential witness in a criminal or civil proceeding because of such proceeding, I.C. § 19-2515(h)(10). As

to Fred's murder, the court found beyond a reasonable doubt one statutory aggravating factor, that at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2).

The Sixth Amendment entitles capital defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589. The effect of *Ring* was to convert statutory aggravating circumstances relevant to sentencing into "the functional equivalent of an element of a greater offense," which must be proved to a jury beyond a reasonable doubt. *Id.* at 606-09; *Apprendi v. New Jersey,* 530 U.S. 466, 482-84 (2000). Thus, *Ring* rendered unconstitutional the sentencing scheme of I.C. § 19-2515 (2001), which required the trial judge to make the factual findings regarding the existence of aggravating circumstances. *State v. Lovelace* (*Lovelace I*), 140 Idaho 53, 66-67, 90 P.3d 278, 291-92 (2003). "This Court must first resolve whether the error is harmless beyond a reasonable doubt where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." *State v. Lovelace* (*Lovelace II*), 140 Idaho 73, 79, 90 P.3d 298, 304 (2004). This Court will find harmless error under such circumstances only if no reasonable jury could find that the State failed to prove the aggravating factors beyond a reasonable doubt. *Id.*

Based in part on the reasoning presented in a line of Alabama cases,[12] the State maintains that verdicts produced at the guilt stage of a trial can show that the jury found a defendant guilty of aggravating factors. These findings by the jury in this instance, the State argues, meet the criteria for the multiple-murder aggravator, I.C. § 19-2515(h)(2). A similar argument was advanced by the State in *Lovelace II*. There, Lovelace had been found guilty of first-degree murder and first-degree kidnapping. *Lovelace I*, 140 Idaho at 59, 90 P.3d at 284. However, the State argued that because the jury had found Lovelace guilty of kidnapping, it was harmless error that the trial court did not include the statutory aggravating factors in the instructions to the jury. *Lovelace II*, 140 Idaho at 79, 90 P.3d at 304. This Court noted that the State was "asking the Court to determine what the jury would have found had it been presented with instructions defining [the statutory aggravating factors that were] to be applied to the facts surrounding the murder." *Id.*

To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm. First, it violates the jury-trial guarantee for a court to "hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be[.]"

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[12] The cases include *Turner v. State*, 924 So.2d 737 (Ala. Crim. App. 2002); *Irvin v. State*, 940 So.2d 331 (Ala. Crim. App. 2005); and *Tomlin v. State*, 909 So.2d 213 (Ala. Crim. App. 2002).

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Next, the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. Moreover, to accept the State's argument would be to look at the form of the jury verdict, rather than the effect of using it to sentence Shackelford to death. *Ring* instructs that this cannot be done. 536 U.S. at 604. Rather, when presented with this same argument by Arizona – that the defendant had been found guilty of a crime which could also serve as an aggravating factor – the Supreme Court noted that this argument overlooks the relevant inquiry of effect, rather than form. *Id.* Instead, if "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602. Therefore, a "defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 602 (quoting *Apprendi*, 530 U.S. at 483) (alterations removed).

In this case, the charge to the jury on first-degree murder for both Donna and Fred had elements including that the killing occurred in Latah County and on or about May 29, 1999. The verdict form reads simply: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." There was no finding by this jury that, at the same

time one murder was committed, the defendant committed another murder.

Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring* because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time. Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

III. CONCLUSION

We affirm the district court on all issues. We affirm on the order for resentencing on different grounds and remand for a sentencing hearing pursuant to § 19-2515 (2008).

Chief Justice EISMANN and Justices J. JONES, W. JONES and HORTON, **CONCUR**.

CASE NO. CV01-04272
April 8, 2005 9:40 AM
CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Illegible] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DALE CARTER SHACKELFORD Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV-01-004272 [SP-01-00366] **MEMORANDUM DECISION AND ORDER REGARDING THE PETITIONER'S MOTION FOR SUMMARY DISPOSITION**

The Petitioner, Dale Shackelford, has filed a motion for partial summary disposition of his claims under the Uniform Post-Conviction Procedures Act. I.C. §§ 19-4901-4911. Oral argument on the motion was heard on November 15 and 16, 2004. The Petitioner was represented by Mark Ackley and Kimberly Simmons of the State Appellate Public Defender's Office. The Petitioner participated by telephone from the Idaho State Correctional Institution in Boise. The State was represented by Robin Eckmann, Senior Deputy Prosecuting Attorney for Latah County. The Petitioner's motion is now ready for disposition.